

HJR 622 STUDY: CHESAPEAKE BAY PRESERVATION ACT - EXPANSION

RESOLVED FURTHER, That the Chesapeake Bay Local Assistance Department be requested to submit to the Commission for inclusion in Commission's interim report (i) **an assessment of the benefits to the environment, along with the costs and effects to state and local governments of extending the Act to include localities outside of "Tidewater Virginia" that are within the Chesapeake Bay watershed;** (ii) **the potential need for changes to existing regulations to reflect differences in the topography and geology for such an expansion;** and (iii) **the financial resources needed in the form of state implementation grants to local governments for such an expansion.** The Department shall complete and submit its findings and recommendations to the Commission by October 20, 2001.

VI. CHANGES TO THE CURRENT PROGRAM

This Chapter addresses the potential need for changes to existing regulations to reflect differences in the topography and geology and other items for an expansion of the Bay Act to the balance of the Chesapeake Bay Watershed. As this study progressed, it soon became evident that not only would changes need to be made to the performance criteria, but that changes would be necessary to all aspects of the program including its organization. Besides this study, CBLAD was concurrently processing a substantial change to the Act's Regulations. Hundreds of comments were received and are contained within a two-volume "response to public comment" document. CBLAD had the opportunity to consider those comments, in addition to the expansion specific testimony gained at the outreach meetings, in exploring the subject of potential changes.

Overall Framework and Organizational Matters: As stated in the assessment portion of Chapter V, the current (CBLAD) program cannot simply be applied to the expansion area by inclusion of the affected localities to the Act and have it work in an efficient and effective manner. Thus, in addition to looking at just the performance standards, the way in which the Act and its Regulations are implemented were examined.

Rethinking the legislative framework: In looking at the content of Chapter IV, the emphasis of the program is upon maintaining and enhancing the quality of all state waters. This is stated purpose in the Act that, in § 10.1-2100.A, addresses "the protection of the public interest in the Chesapeake Bay, its tributaries, and other state waters". In § 10.1-2107, the criteria to be developed by the Board are to assist localities in "regulating the use of land and development of land and in protecting the quality of state waters". In § 10.1-2109.B, C, and D, local governments are charged to protect the "quality of state waters" through changes to their comprehensive plans and land development ordinances.

In the total context of preservation of the Chesapeake Bay, the framework of preserving the main-stem of the Bay through improvement of the tributaries that feed it and the streams that feed them is basic. This is acknowledged through the existence of the tributary strategies program. However, as the waterways are further removed from the main-stem of the Bay, the connection with the Bay itself is harder to conceptualize. In addition, considering that there should be changes to the performance criteria along with

some procedural changes, the subject of changing the name of the Act or the establishment of a separate act or regulations was raised.

During the outreach meetings and in discussion with the Environmental Benefits Focus Group, it was suggested that a separate set of regulations and perhaps a separate act would be appropriate. For better understanding and acceptance a name such as the “Chesapeake Bay Rivers Act” was suggested. This name keeps both the linkage to the Bay (along with fulfilling the Commonwealth’s original commitment in the Bay Agreements) and provides for a program addressing the entire watershed. Consideration was given to modifying the current Act and providing separate sections within the current regulations to address performance standards that would apply to both areas and those specific to the existing area (Tidewater) and the proposed expansion area. However, after review of the entirety of this report, it became evident that both a new act and new regulations are appropriate.

Legislative changes: To accommodate topographic and geologic matters and to provide for an effective liaison and review program, it is suggested that those localities that are within a planning district commission that is already under the Act be added to the definition of “Tidewater Virginia” contained in § 10.1-2101. These localities are listed in Table VI-1. They would be subject to the Act and its Regulations as they exist at the time of expansion and would proceed under the same program development approach that was used for the original Tidewater localities. Table VI-2 shows the number and type of localities for the current Act and a new Act.

Table VI-1 Potential Localities to be added to the current Chesapeake Bay Act	
<i>PDC/RCs already in the Act</i>	<i>Localities</i>
#15 Richmond Regional PDC	Goochland County, Powhatan County,
#08 Northern Virginia PDC	Loudoun County; Cities of Manassas and Manassas Park; Towns of Hamilton, Hillsboro, Leesburg, Lovettsville, Middleburg, Purcellville, and Round Hill
#19 Crater PDC	Dinwiddie County

Table VI-2 Potential Localities per Existing Act and Expansion Act				
Type of jurisdiction	Current Assignment		Potential Assignment	
	Tidewater	Expansion	Tidewater	Expansion
Counties	29	36	33	32
Cities	17	11	19	9
Towns	38	57	45	50
Totals	84	104	97	91

The ninety-one (91) remaining expansion localities would be included in a new act. The language of the new act could essentially mirror that of the existing act with the exception of its title and the “definition” of the subject localities. The composition of the Board could remain at nine (9), thus accommodating the potential for two at-large

members. The significant change with regard to the legislative/regulatory program would occur in the regulations associated with the new act.

Changes for the new Regulations: The regulations for the expansion area could be in a format that follows the existing Regulations. However, changes should be considered with regard to the following items.

Planning preceding regulation: In order to place more emphasis upon accommodating water quality enhancement as a part of the development process instead of having it viewed more as a structural and regulatory program, there should be an earlier focus upon water quality and land use planning. Thus, it is suggested that the requirement for incorporating water quality protection into comprehensive plans (current § 10.1-2109.B) be the first aspect of a local program. However, in order not to prolong implementation of local regulatory programs, it is possible that a set of regulations that specifically address the comprehensive plan component be prepared and adopted within six months of legislative action. Thus, the local planning component would commence concurrent with the preparation of the performance standards aspect of the new regulations. This approach can have built-in flexibility that will allow the resulting, local regulatory program to be better tailored to the locality and not be subject to the “one-size” criticism that has been made of the existing program. However, there should not be a requirement that the planning phase be completed prior to creating and implementing the local regulatory program.

Sliding scale with regard to the timing of compliance: As a part of the initial set of expansion regulations, consideration might be given to establishing a sequence for compliance so that resources and program development is directed to the areas with the most need. One approach would be to classify the localities in terms of growth and water quality characteristics. A phasing program could be established so that all 91 localities are not preparing programs and competing for funds simultaneously. Those localities identified with a combination of negative or no-growth and no, or minimal, water quality impairment could be scheduled for review in the later years while those with most immediate impact upon water quality, with respect to new development, would be addressed in the first phases.

Resource area designations and performance criteria: The types of items that will need to be considered are in the following section of this Chapter. A stakeholder process should be used as was done in the establishment of the original regulations and as was used in the recent major modification of those regulations for the preparation of new regulations. Adequate resources would need to be allocated for this undertaking (see information in Chapter VII).

Designation and Performance Criteria: The approach that exists in the current Regulations, i.e. the designation of resource areas (RPAs and RMAs) and of performance criteria that applies to them, remains appropriate and should not be changed. However, as identified through the outreach meetings, by the Environmental Benefits Focus Group, and by the content of Chapter IV, there will need to be changes to the resource protection

area and resource management designation criteria and the performance criteria. In addition, as noted in Chapter II, there are currently a few legislative studies that are being undertaken concurrent with the preparation of this report and the results from those studies should be reviewed to assure that their recommendations are appropriately considered if an expansion does occur.

The criteria for resource area designations and performance criteria would need to be addressed through the development of new regulations that address the topics that are addressed below in an abbreviated form. Please refer to Chapter IV for more information about the environmental characteristics and the performance standards. In addition to, or in conjunction with, those items, consideration should be given to impacts from sediment deposition (over the long term as opposed to the control of construction sediment) and the protection of habitat. Neither is specifically addressed under the current regulations.

***RPA*s - - *considerations*:** In the Tidewater area, for the most part, non-tidal wetlands have connections to tidal waters through surface flow. In the proposed Expansion Area, karst topology presents a need to look at *isolated non-tidal wetlands* in a new perspective. This examination will need to look closely at the recently created non-tidal wetland permitting program that is under the auspices of the Department of Environmental Quality (DEQ) and insure that any resulting regulatory requirements are complimentary to each program and do not result in duplication or redundancy.

The characteristics of flood plains in the proposed Expansion Area are different from the flood plains in the coastal areas where flooding is influenced by tides and off coast storms. In the proposed Expansion Area, the *flood plain* should be examined as a potential RPA feature with regard to hydrologic benefits and water quality considerations and not just (storm) event damage minimization.

Due to the prevalence of livestock operations in the proposed Expansion Area, specific attention needs to be focused upon if, when, or under what conditions, *farm ponds* are, or are not, an RPA feature.

In a few Tidewater areas, localities have added the characteristic of *steep slopes* to their RPA designation criteria. This occurs mainly in areas where erosion and the resulting sediment deposition are of concern. In the proposed Expansion Area, due to the topography, there are many more situations where drainage doesn't sheet flow, but goes through land adjacent to RPA features at high velocity. This presents problems both in terms of erosion and sedimentation and with regard to carrying pollutants to the waterways without being filtered through the buffer. Thus, the way in which *steep slopes* relate to the purpose of the RPA needs to be examined.

Also within the RPA definition, attention must be placed upon the *100-foot buffer*. In the current regulations, it is measured from streams and the adjacent RPA feature and it is measured in a horizontal distance. In the mountainous topography of portions of the proposed Expansion Area considerations, this approach would result in the ground length of the RPA buffer being 130 feet for a 40-degree slope and 200 feet for a 60-degree

slope. However, as noted above, the concern is with maintaining the function of the buffer and not just a numeric calculation. Thus, as was done when developing the original regulations, the way the buffer is defined will need to be closely examined.

RMAs - - considerations: As was expressed at some of the outreach meetings, the current policy of identifying a RMA primarily through highly erodible soils (with a slope factor component), highly impermeable soils, and flood plains would place nearly all of the proposed Expansion Area into it. While this may be viewed as a positive step for environmental enhancement, i.e. having an entire jurisdiction as a RMA/RPA, the downside is that characteristics more unique to the karst topology such as wellhead protection, the protection of drinking water sources including springs, and dealing with sinkholes may not receive the attention that is necessary to adequately work the protection and enhancement of the quality of state waters unless they are specifically identified as a basis for the RMA designation. Thus, the very basis for the designation of the RMA in the proposed Expansion Area must be reviewed and revised.

Performance Criteria: At the present time, all of the performance criteria should be continued into the proposed Expansion Area. However, realizing that there will be a time period of 18 to 24 months necessary for the preparation and adoption of regulations, it is necessary, going into the process, to draw from the work of the karst study, the wastewater study, and other legislative studies and adjust the existing performance criteria appropriately.

Of the eleven performance criteria, the *three general criteria* (minimizing land disruption, preserving natural vegetation, and minimizing impervious cover impacts) would certainly continue to be applicable and addressed through the low-impact site design and technologies and better site design approaches being pioneered, in Virginia, by CBLAD. Likewise, the buffer management strategies for which CBLAD has provided guidance will continue to be applicable with some changes necessary to accommodate the differences in the native vegetation of the regions within the proposed Expansion Area.

The two criteria dealing with stormwater management should not have to change since the currently proposed changes to the Regulations incorporate the State's Stormwater Manual guidance and provide for a cooperative and coordinated approach between DCR and CBLAD in addressing stormwater matters.

As noted in Chapter IV, the difference between the Bay Act requirements and the State's Erosion and Sediment Control (E&SC) law is that the threshold is at 2,500 square feet under the Act as opposed to 10,000 square feet under the E&SC law. Given that two-thirds ($2/3^{\text{rds}}$) of the Commonwealth would be subject to the lower threshold with an expansion of the Act, consideration could be given to modifying the E&SC requirement. This would also help in reducing some confusion and coordination issues associated with administration and enforcement of the E&SC law and the Bay Act.

As directed through HJ 771, issues associated with individual wastewater treatment, primarily septic systems, need a thorough and comprehensive look across the

Commonwealth. The requirements of the Act and its Regulations may be better integrated into such a comprehensive program. Thus, this relationship should also be a focus in the preparation of new or revised regulations for the Expansion Area. The remaining performance criteria (addressing agricultural operations, silviculture, and wetland permitting) should not require extensive change or adjustment given recent program and procedural changes that have been effected by CBLAD.

Program development: The development of the overall program must take into consideration the changes that have occurred since adoption of the original Bay Act and its Regulations. The Commonwealth has instituted several new programs since the late 1980's and early 1990's. The Commonwealth has new obligations with regard to the Bay Agreement and the commitments contained therein. Also, it must consider the impact upon local governments, not just in terms of technical and financial assistance (described in Chapters V and VII) but also in terms of actual, day-to-day, implementation of the program. As stated in § 10.1-2100.B, "local governments have the initiative for planning and implementing" the provisions of the Act. The Commonwealth has the obligation of acting in a supportive role by establishing the criteria and providing the resources necessary to carry out and enforce the Act. A part of this obligation is to ensure that State programs do not result in redundancy and that the requirements imposed by the multiple programs of the State do not burden the administrative capacity of local governments.

In developing the program for the proposed Expansion Area, its relationship to the tributary strategies, the TMDL program, the E&SC program, and VPDES programs along with other activities must be considered. As was suggested at one of the outreach meetings, "weave it, don't stack it".